In fact, the rules as adopted are in direct opposition with the mandate for parity among all CMRS providers.

III. The Rules Discriminate Between 800 MHz Licensees and Cellular Incumbents

In amending Section 332(c) of the Act Congress specifically classified SMR service providers meeting the relevant criteria and cellular service providers as a single class, Commercial Mobile Services. Congress intended that this single classification of all mobile services which are provided for profit and make interconnected service available to the public would result in regulatory parity among SMR service providers and cellular service providers.

The rules adopted by the Commission in implementing this symmetry of regulation, however, do not achieve a level playing field among these formerly disparate competitors. Again, there are two ways in which the Commission's rules fail to achieve the parity demanded by Congress.

As discussed above, incumbent licensees in the 800 MHz SMR frequencies must now suffer uncertainty and concomitant disruption as the Commission determines how it will make large blocks of spectrum available in MTA and BTAs. Under the newly adopted rules, at the very least, these incumbent competitors will be locked to their current transmitter sites with the exact number of channels, or fewer, licensed to them today. These incumbent competitors will have no flexibility to meet customer needs and certainly no capacity to grow. As a practical matter, in order to make the rules adopted by the Commission work, these incumbent competitors will be forced to relocate to the less desirable "lower 80" channels, when their highest bidding 800 MHz competitor takes its place on top of them.

There is no similar proposal to restructure and relicense the spectrum by which cellular competes in this marketplace. By the Commission's recent revisions of the rules, Cellular, in fact, will become more flexible and grow more easily to meet customer needs. Clearly, the Commission's rules do not provide a level playing field for these two services which today comprise CMRS.

Additionally, there is a palpable disparity between the licensing of the newcoming competitor at 800 MHz and the incumbent cellular licensee. Very simply, the newcomer will face payment of the high bid and any costs of negotiation and relocation of incumbent licensees on the spectrum acquired at auction, while cellular faces no auction. Further, during the time the newcomer is participating in auction, negotiating with the incumbent and constructing its new system, the cellular incumbent again is able to continue its agile, growing business in the marketplace. The Commission recognized the competitive disadvantage such a "head start" can cause. The Commission developed the head start doctrine to preclude a wireline licensee from obtaining an irreparable advantage over its non-wireline competitor in the same market due to the earlier provision of service.

Without a similar proposal to auction the spectrum licensed to incumbent Cellular licensees the auction of currently occupied 800 MHz spectrum contravenes the Congressional mandate to regulate all Commercial Mobile Radio Services ("CMRS") alike by creating disparate regulatory treatment between cellular providers and displaced SMR providers. Individual SMR providers are also illegally disadvantaged because they must pay for spectrum that cellular operators have acquired without a similar contribution to the

Commission's auction fund. These disparities clearly inhibit competition and contravene the Act in so doing.

IV. Adoption of the Licensing Rules is not Consistent with APA

A. The Rules Adopted do not Rationally Relate to the Mandate.

The Budget Act specifically orders the Commission to achieve parity between and among the traditional SMR and cellular services provider. The Commission has wide discretion in implementing its rules designed to achieve this regulatory parity. In doing so, however, the Commission developed rules which will necessarily affect the fundamental rights of incumbent licensees. When the Commission proposes to affect fundamental rights, strict scrutiny of the new rules is appropriate. Not only must the new rules be reasonably related to the goal of the Congressional Mandate, they must be narrowly tailored to meet the goal.

Clearly, the Commission's decision to license two hundred channels in each MTA/BTA already licensed to service providers is a decision which is not narrowly tailored to accomplish regulatory parity. Within its discretion, and consistent with the Commission's parity mandate, the Commission is free to protect the SMR incumbent and encourage it to grow. 800 MHz SMR licensees would then be free to form consortia and develop regional consortia to compete more effectively. This less restrictive means of accomplishing the parity's mandate would work and would preserve the traditional SMR operation.

B. The Record Does Not Support Adoption of the Rules.

In determining to license 800 MHz facilities on an MTA/BTA basis the Commission relied, in part, on comments solicited in the 800 MHz EMSP Notice.[15] It is important to note, as the Commission does, that the 800 MHz EMSP Notice proposed to license 800 MHz facilities on an MTA/BTA basis only to the extent such channels were available.[16] This limitation on the 800 MHz EMSP proposal is missing from the rules adopted in the Third Report and Order. Because of this material difference, the Commission cannot rely on the comments in the 800 MHz EMSP Notice to support its actions in the Third Report and Order. The Commission must reconsider its adoption of the MTA/BTA licensing scheme based solely on the comments received in the Further Notice of Proposed Rulemaking on which the Third Report and Order is based. Clearly, in the Third Report and Order proceeding, commenters questioned the wisdom of adopting Commission-defined licensing areas in view of the scarcity of available channels to serve the larger Commission defined areas.[17]

V. The Rules Will Interrupt and Delay Service to the Public

In all of its actions, the Commission must always consider the public interest standard. Traditionally, the determination that an action is in the public interest has been

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[15] 8 FCC Rcd ___.

[16] 9 FCC Rcd ____ at Para. 97.

[17] See Citizens to Preserve Overton Part v. Volpe, 401 U.S. 402 91 S. Ct. 814, ___ L Ed. ___ (1971).

characterized by expedited implementation of new or improved service to the public.[18] The rules proposed for the award of 800 MHz licenses in the Third Report and Order would clearly result in an interruption of service currently provided and a delay in provision of new service as new licensees get into place and start up operations. Clearly, there is no guarantee that even if an applicant shows and bids at auction, it will ever provide service. Just as clearly, the existing licensees at 800 MHz have provided service. In fact, they have provided service so vigorously that Congress has determined that they should be regulated on par with cellular service providers, those competitors who are granted larger geographical and spectral territory to compete.

Now, the Commission has adopted rules which will destroy the SMR industry and replace it with new competitors at some point in the future only after interruption and delay. In determining that this was an appropriate course of action, the Commission must have assessed the costs in the short term compared to the benefit in the long term.

CCI urges the Commission to reconsider this cost/benefit analysis. In reconsidering this analysis, the Commission should be mindful of the significant competitive contributions incumbent 800 MHz licensees make to the wireless communications marketplace. These licensees are the entities which caused the industry to grow into a competitive threat to the much better financed, wide-area and block-spectrum licensed service provider. The incumbent 800 MHz licensee currently provides important service to the public, including

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[18] See Fleet Call, Inc. 6 FCC Rcd 1533 (1991) Advanced Mobile Phone Service, Inc. (LA Wireline Order), 93 FCC 2d 683 (1983).

sheriff, police, ambulance, school bus and other community and governmental users, as well as individual and fleet customers.

In assessing the trade-off for block spectrum MTA/BTA licensing, it is clear that the Commission is banking on the success of one or maybe two large service providers. The Commission must be mindful, however, that despite grant of wide-area licenses over two years ago, these ESMR licensees have not constructed any significant portion of their licensed systems. In fact, it appears that the equipment, the very foundation on which these ESMR proposals are based, does not work at the six times oversampling touted by industry pundits in various applications for special treatment before the Commission.

While the Commission has the discretion to sacrifice the short-term competitive advantages of experienced 800 MHz service providers to remain in place in the name of the long term goal of yardstick parity with cellular, CCI submits that 800 MHz licensees currently compete strongly with cellular. The trade-off in the name of yardstick parity is unnecessary and extremely cost-ineffective. The Commission must demonstrate that the uncertain benefits of its approach exceed the costs of the substantial disruption that will result from its chosen course of action. The Commission has failed to so substantiate its actions.

VI. The Freeze was Implemented Without Proper Notice.

On August 9, 1994, the Commission issued a News Release announcing the suspension of the acceptance of applications for new or modified 800 MHz facilities.[19] This

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[19] See Report No. DC-2638, "Regulatory Framework for CMRS Completed." This News Release specifically notes that "[t]he Commission further decided that in light of the changes to be implemented in 800 MHz licensing, acceptance of new 800 MHz SMR applications (including SMR applications for General Category channels) will be suspended, effective immediately, until

News Release, however, does not appear on the Commission's Daily Digest until August 10, 1994. Because the freeze is an agency statement designed to prescribe law, policy or procedure in relation to the acceptance of applications for 800 MHz SMR facilities, it is a "rule" within the meaning of Section 551(4) of the APA.[20] Section 552(a)(1) of the APA provides that each agency shall separately state and currently publish in the Federal Register for the guidance of the public the promulgation of such rules.[21] Section 553(d) of the APA

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new licensing rules are adopted.

[20] As a result of the implementation of the freeze, an application file by CCI to serve the Mid-South region was returned. CCI filed its Petition for Reconsideration of this action on October 8, 1994. That Petition for Reconsideration is attached hereto and incorporation by reference. Section 551(4) of the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

[21] Specifically, Section 552(a)(1) provides that these items shall be published in the Federal Register:

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the *methods whereby*, the public may obtain information, make submittals or requests, or *obtain decisions*;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

prescribes that the required publication or service of a substantive rule shall be made not less than thirty (30) days before the proposed effective date.[22] In determining that promulgation of a rule is subject to the publication requirements, the U.S. Court of Appeals for the Fourth Circuit considered whether the rule "so directly affect[ed] pre-existing legal rights or obligations, indeed that [the rule] is of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence."[23] Because the Commission failed to give proper notice before implementing the freeze of the acceptance of 800 MHz applications, the freeze must be reconsidered and rescinded. Further, because it is a substantive Rule, the Commission was required to provide Notice & Opportunity for comment before adoption. This argument is

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> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
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> (E) each amendment, revision, or repeal of the foregoing.

See 5 U.S.C. § 552(a)(1). Emphasis added.

22 Except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency *for good cause found and published with the rule.* See 5 U.S.C. 553(d). Emphasis added. Clearly, under Batterton and Section 553(d)(3) of the APA, the Commission could have found good cause for implementing the freeze sooner than thirty (30) days from Federal Register publication. However, Section 553(d)(3) is explicit. If the Commission did find good cause for early implementation, it must publish that good cause with promulgation of the rule. The Commission did not do so. See Third Report and Order, 9 FCC Rcd __, para. 108, 415.

23 See Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977). Citations omitted.

more fully developed in the Petition for Reconsideration of the return of the application attached hereto.

VII. Sunset of the Special Temporary Authorizations in SMR is Improper.

In paragraph 384 of the Third Report & Order, the Commission proposes to sunset all awards of Special Temporary Authority ("STA") under Part 90 of the Commission's rules. CCI is the manager of many facilities constructed pursuant to STA. These facilities were relocated from sites which became unavailable because the conduct of other lessees caused the tower owner to decide to discontinue leasing space to third parties. These circumstances were spelled out in the requests for STA. The requests were accompanied by the necessary affirmation by the licensee. Applications for permanent modification of the relevant facilities were filed, in most cases contemporaneously with the request for STA. Some of these applications have been pending before the Commission for over one year.

Because the STAs were properly obtained by a demonstration of good cause for the grant and for reasons beyond the control of the licensee, they should not be sunset just because they were granted under Part 90. CCI requests that the decision to sunset all Private Radio Bureau STAs be reconsidered and rescinded. In the alternative, CCI requests that the expiration be stayed for a reasonable period of time, giving the Commission time to process and grant the permanent modification applications currently pending at the Commission.

VIII. Relief requested

For the foregoing reasons, CCI respectfully requests that the Commission reconsider its decision to license 800 MHz spectrum formerly allocated to the SMR service by MTA/BTA and in blocks of spectrum. CCI requests that the Commission leave incumbent

800 MHz competitors in the positions occupied by them today. The Commission should accept site specific proposals which draw mutually exclusive applications after appearing on Public Notice which would then be granted by competitive bidding. CCI notes that this design for licensing the unoccupied 800 MHz frequencies will result in creative and strategic bidding. By implementing this scheme, the Commission will allow the marketplace to decide which system in which market should be constructed and placed into operation when. It would further leave the incumbent 800 MHz service providers in place providing service and competing on an even playing field with both cellular licensees and any other new entrant. Further, this proposal is consistent with the Congressional auction authority.

Respectfully submitted,

CHADMOORE COMMUNICATIONS, INC.

By: _____

Albert H. Kramer
Marjorie K. Conner

Its counsel

Keck, Mahin & Cate
Penthouse
1201 New York Avenue
Washington, D.C. 20005

(202) 789-3423

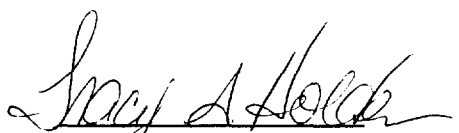
December 21, 1994

EXHIBIT 4

CERTIFICATE OF SERVICE

I, Tracy A. Holden, a legal secretary in the law firm of Keck Mahin & Cate, certify that I have this 5th day of January, 1995, caused to be send by first-class U.S. mail, postage prepaid, a copy of the foregoing "COMMENTS" to the following:

Robert S. Foosaner
Nextel Communications, Inc.
601 13th Street, N.W.
Suite 1110 S.
Washington, DC 20005



Tracy A. Holden